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No. 05-1410

FILED
AUG 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EMMA RODRIGUEZ,

Petitioner,

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, MARI CARMEN APONTE, MARCOS VILAR, MAIRYM RAMOS, & AIDA SANCHEZ,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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The sovereign immunity available to territories was last discussed by this Court in 1913 and has not been revisited since this Court's decisions in *Alden v. Maine*,[1] and *Seminole Tribe*.[2] Territorial sovereign immunity is one of the last remaining immunity questions to be resolved by this Court. The decision below granting Puerto Rico sovereign immunity from the federal Fair Labor Standards Act claims of a New York citizen conflicts with the other Circuits and conflicts with the clear language of the prior sovereign immunity decisions of this Court.

Point One: The Decision Below Incorrectly Found that the PRFRA Requires Puerto Rico Be Treated Equally to the State.

The decision below incorrectly grants Puerto Rico sovereign immunity to Congress's clear direction that it be liable for violations of the Fair Labor Standards Act (FLSA). Congress clearly intended Puerto Rico to be liable as an employer under the FLSA. 29 U.S.C. § 203(c); 207. Congress intended to abrogate any immunity Puerto Rico or the States might have in the FLSA. *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000). Congress did not have the authority to abrogate State sovereign immunity with respect to private citizen suits because the States have a Constitutional sovereign immunity defense to private citizen suits.[3] *Alden, supra.* Puerto Rico does not have this Constitutional defense. Congress's express direction that

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1. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

2. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996).

3. Congress had the authority to abrogate State sovereign immunity with respect to Secretary of Labor actions. *Alden, supra.*

Puerto Rico be liable if it violates the FLSA is Constitutionally authorized by the Territory Clause of the Constitution. U.S. Const., Art. IV, § 3, cl. 2.

The Court below granted Puerto Rico sovereign immunity to the same degree afforded the states under the Eleventh Amendment. Puerto Rico argues that this decision was correct and it should receive sovereign immunity to the same as the states because 1) Section 734 of the PRFRA "commands" equal treatment for Puerto Rico, and 2) the FLSA defines the word "State" to include territories. Both arguments involve substantial sophistry.

Section 734 cannot "command" equal treatment between Puerto Rico and the States because the Constitution treats territories and states differently and explicitly grants Congress authority to regulate Puerto Rico. U.S. Const., Art. IV, § 3, cl. 2. This Court has already held that Congress does not have to treat Puerto Rico equally. *Harris v. Rosario*, 446 U.S. 651, 651-2 (1980). Here, the rational basis for the different legislative impact of the FLSA is that the States have Eleventh Amendment immunity; Puerto Rico does not. Section 734 cannot and does not change Congress's Constitutional authority to regulate Puerto Rico.[4] Nothing

4. Puerto Rico maintains that § 734 "commands equal treatment and '[t]he only way to give section 16(b) 'the same force and effect in Puerto Rico as in the United States' is to hold, . . . that Puerto Rico likewise enjoys immunity from private FLSA enforcement suits.'" Opp. p. 4. By the word "likewise" Puerto Rico seeks to appropriate Eleventh Amendment sovereign immunity it cannot possess under the Constitution. Further, § 734 does not "command equal treatment" for Puerto Rico. Rather, it clearly says that federal statutes apply in Puerto Rico just as they do in the U.S., except as separately provided by (Cont'd)

in this Court's rulings suggest any such restriction on Congressional authority, by virtue of § 734, the Constitution or by virtue of any other source of law. *Id.*

Puerto Rico's argument is that Congress demonstrated a desire that Puerto Rico be treated identically to states within the FLSA itself, by lumping the territories into the definition of "state." 29 U.S.C. § 203(c). Therefore, Puerto Rico contends that when the States were held immune under the 11th Amendment, Congress meant the same Constitutional defense to apply to Puerto Rico.

There are several critical errors in this argument. First, the definition of states in the FLSA also includes the District of Columbia[5] and "possessions" as well as Territories.

(Cont'd)

Congress. This case arose in New York and the FLSA most assuredly applies in New York. Plaintiff is a New York citizen and the FLSA's application in Puerto Rico is not implicated in this case at all. There is also no doubt that the FLSA and 216(b) apply in New York. That Congress made the FLSA applicable to Puerto Rico as an employer also is clear. 29 U.S.C. § 203(c).

5. This Court has already held that:

> Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved. Indeed, such '(w)ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well the context, the purposes of the law, and the circumstances under which the words were employed.'

District of Columbia v. Carter, 409 U.S. 418, 420 (1973).

Clearly, the District of Columbia does not get state sovereign immunity to FLSA liability just because the States do. The Courts have not so found. *See, e.g., Brown v. Dist. of Columbia Bd. of Educ.*, No. 00-135 (D.D.C. February 17, 2005) (order granting FLSA judgment). There is no reason that Puerto Rico should obtain the benefit of constitutional sovereign immunity by the FLSA, anymore than it gets under the Constitution.[6] Second, the main problem with the ruling below is, as the District Court below found, that it requires reading Congressional intent to be exactly the opposite of what Congress said and did – which was to make Puerto Rico liable for violations of the FLSA. To find that Congress intended Puerto Rico to get the benefit of the State's Constitutional sovereign immunity requires "(i) speculation, (ii) about legislative intent, (iii) in the face of unambiguous statutory language requiring a different result." *Decision below, Rodriguez v. Puerto Rico Federal Affairs Admin.*, 338 F. Supp. 2d 125, 129 (D.D.C. 2004). Third, this Court has already declared in *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000), that Congress meant to override sovereign immunity in creating a private right of action.

The decision below conflicts with this Court's finding that Congress has the Constitutional power to regulate Puerto Rico, that it may do so differently from the States, whenever it finds a "rational basis" for doing so, and in fact did so in the FLSA.

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6. Neither do other territories get state sovereign immunity. *Norita v. Commonwealth of the Northern Mariana Islands*, 331 F.3d 690 (9th Cir. 2003).

Point Two: The Decision Below Conflicts With This Court's Sovereign Immunity Rulings.

This Court has not addressed Territorial sovereign immunity directly since 1913. But the clear import of this Court's other sovereign immunity decisions is that, "only States and arms of the State possess immunity from suits authorized by federal law." *Northern Ins. Co. v. Chatham County*, 126 S. Ct. 1689 (2006). *See also Alden v. Maine, supra.* The D.C. Circuit's decision below directly contradicts this language. Puerto Rico claims there is no contradiction, but cannot explain how they can possibly be consistent.

Point Three: The Decision Below Conflicts with Other Circuits.

Similarly Puerto Rico denies that the decision below conflicts with the Ninth Circuit which found that the Commonwealth of the Northern Mariana Islands did not possess sovereign immunity to the FLSA, notwithstanding the very same Congressional provision, 29 U.S.C. § 216 was at issue there too. Puerto Rico attempts to harmonize the Ninth Circuit decisions by claiming that the Court there found that CNMI "waived" its sovereign immunity under its own particular "compact." But the Ninth Circuit decisions in *Fleming v. Department of Public Safety*, 837 F.2d 401, 405-6 (9th Cir. 1988) and *Norita v. Commonwealth of the Northern Mariana Islands*, 331 F.3d 690, 693 (9th Cir. 2003) simply are not "waiver" cases. The Ninth Circuit simply did not find that CNMI waived sovereign immunity it otherwise possessed.

Puerto Rico also denies that the decision below conflicts with the decisions of the First Circuit. However, that Circuit

locates sovereign immunity for Puerto Rico directly in the Eleventh Amendment. *Redondo-Borges v. U.S. Dept. of Housing and Urban Development*, 421 F.3d 1, 7 (1st Cir. 2005). Puerto Rico claims consistency with the First Circuit by citing to *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34 (1st Cir. 2000) which found that Puerto Rico was not liable under the FLSA. That decision found Puerto Rico possessed sovereign immunity but apparently, not under the Eleventh Amendment. That decision is something of an anomaly in the First Circuit, however, as that Court has repeatedly, both before and after *Jusino Mercado*, found that Puerto Rico's immunity springs directly from the Eleventh Amendment. *See, e.g., Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1983); *Redondo-Borges v. U.S. Dept. of Housing and Urban Development*, 421 F.3d 1, 7 (1st Cir. 2005). Thus, the First Circuit has itself taken inconsistent approaches to Puerto Rico's immunity from federal statutory liability, however, the vast weight of decisions in that Circuit finds Puerto Rico possesses Eleventh Amendment sovereign immunity and the decision below conflicts with those decisions. Clearly the First, Ninth and D.C. Circuits have taken very different positions on what kind of immunity Puerto Rico possesses.

Point Four: Territorial Sovereign Immunity is An Important Question that Only This Court Can Resolve.

Puerto Rico argues that Congress does not have the power to abrogate its immunity. Opp. p. 10. Puerto Rico argues that it is only subject to the Constitution and the PRFRA. Opp. p. 10. This assertion of authority flies in the face of this Court's pronouncements. *Harris v. Rosario*, 446 U.S. 651, 651-2 (1980). Puerto Rico's attempt to secure

freedom from Congressional oversight is contrary to the Territory Clause, U.S. Const., Art. IV, § 3, cl. 2, and finds no support in this Court's sovereign immunity jurisprudence. *Northern Ins. Co. v. Chatham County*, 126 S. Ct. 1689 (2006). Congress intended to abrogate Puerto Rico's immunity from private actions. *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000). Congress had that power.[7] U.S. Const., Art. IV, § 3, cl. 2. Congress's express intent has been frustrated by the decision below, incorporating the State's sovereign immunity to Puerto Rico under the guise of § 734.

The differing positions in the Circuits places Congress in an untenable bind, which Puerto Rico cannot dispute and must enjoy. Under the D.C. Circuit's analysis, Congress would be required to undertake a statute by statute review of which statutes should apply to Puerto Rico, but by the First Circuit's analysis, any such specification is entirely beyond Congress's power. As long as this limbo can last, Puerto Rico benefits, and its citizens and employees suffer from the lack of clarity that only this Court can remedy.

Congress, Puerto Rico, the other territories, and any person or entity dealing with any territory has a strong interest in knowing exactly what immunity the territories do or do not possess. At this point, only this Court can answer this question.

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7. "Congress, . . . is empowered under the Territory Clause of the Constitution, U.S.Const., Art. IV, § 3, cl. 2, to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,' [and] may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Harris v. Rosario*, 446 U.S. 651, 651-2 (1980).

CONCLUSION

The Court of Appeals' decision below is wrong, conflicts with decisions in the Ninth and First Circuits, and conflicts with this Court's recent pronouncements in *Northern Insurance Company of New York, supra.* This Petition for Certiorari should be granted so that this Court can resolve the confusion in the circuits on the important question of the nature and extent of territorial sovereign immunity.

Respectfully submitted,

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